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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner*

v.

OVERNITE TRANSPORTATION COMPANY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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v.

OVERNITE TRANSPORTATION COMPANY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered May 2, 1962.

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 257 N.C. 18, and is attached hereto as Appendix "A". (See also R. 614).

JURISDICTION

The judgment and order of the North Carolina Supreme Court was entered on May 2, 1962, and a Petition for Re-

hearing was denied on July 9, 1962, making such judgment final.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether, in a suit for damages brought in a state court under Section 303 of the National Labor Relations Act, that Section, principles of federal preemption, and the protections accorded peaceful primary picketing under the federal law require the severance and elimination of damages arising out of legal picketing activities from damages arising out of illegal picketing activities where such activities are separately conducted and the damages are capable of separate calculation?

2. Whether federal labor law or policy requires the granting of a new trial in such a suit where the trial court has admitted to the jury prejudicial evidence relevant only to a claim for punitive damages, which claim the state supreme court has determined was not separately pleaded and was thus not allowable in a Section 303 action?

STATUTES INVOLVED

Section 303 of the National Labor Relations Act, 61 Stat. 156, 29 U.S.C. 151 et seq., prior to its amendment in 1959 read as follows:

SEC. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using,

selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

STATEMENT OF CASE

In September of 1959, respondent Overnite Transportation Company, a common carrier of motor freight operating out of Atlanta, Georgia, in the mid-southern states, filed an action for damages against petitioner, a national labor organization, in the Superior Court of Mecklenburg County, Charlotte, North Carolina. The action was brought under Section 303 of the Taft-Hartley Act and alleged that petitioner had engaged in various striking and picketing activities in violation of that Section, which had resulted in actual damages to the respondent in the amount of $500,000 and punitive damages in the amount of an additional $500,000. No separate cause of action for punitive damages was stated, nor were there any allegations of violence, mass picketing or other disorder. (R. 3-6).

At the jury trial, which commenced in November of 1961, plaintiff introduced evidence indicating as follows: The petitioner, in May of 1959, through its affiliated local unions in the area, called a strike against respondent Overnite. The object of the strike was to achieve recognition for the union and a collective bargaining agreement for Overnite's employees. (R. 286-7; 311-12; 314). Petitioner had not been certified as a representative of Overnite's employees by any government agency. (R. 300). The strike was accompanied by peaceful picketing carried on at Overnite's headquarters in Atlanta and its terminals in Savannah, Georgia, Columbia, South Carolina, Charleston, South Carolina and Richmond, Virginia. (R. 288, 312-13). In addition, in several cities in North Carolina and South Carolina other than the above, the pickets followed trucks of Overnite and picketed these trucks when they were engaged in loading or unloading at terminals or premises of other employers. This picketing likewise was peaceful. In some of the foregoing cities, Overnite terminals were also located and were also peacefully picketed. (R. 55). There was no attempt to show, nor did the evidence indicate, that employees of any other employers were regularly employed

at or on any premises or terminals of Overnite; no Overnite premise was a common situs of employment.

The picketing at Overnite's premises and terminals where only Overnite's employees were employed resulted in the refusal of some of these employees to cross the picket lines and the refusal of the employees of other carriers who were handling Overnite freight or were interlining with Overnite, to cross the picket line. (R. 203-4, 206-207). In addition, the picketing of Overnite trucks at the terminals of other carriers or employers resulted in the refusal of the employees of those carriers and employers to handle or interline Overnite freight. As a result of these various refusals, Overnite was put to considerable expense in hiring additional help and facilities in order to carry on its freight-carrying and interlining business, namely, the sum of $232,837 in wages for additional employees employed as a result of the strike activity, $16,662 in hiring guard service for protection purposes,[1] $2,116 in extra telephone and communication expenses, $51,757 in increased claims for damage to freight caused by inexperienced new employees, and finally, an estimated $59,819 in net income fall-off or profit loss during the strike,[2] for a grand total of claimed actual damages in the amount of $363,193. (R. 241-245, 233, 234, 237-239, 338).

At the trial defendant objected to the introduction of the evidence of peaceful primary picketing at Overnite's own premises and terminals, and to the introduction of evidence of damages allegedly resulting from this picketing. (R. 211-15, 217-18, 222).

At the conclusion of the trial, the trial court failed to explain to the jury members, with any particularity, the

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[1] This in spite of the fact that there was no showing whatsoever of any violence or disorder in connection with any of the striking or picketing activities of petitioner.

[2] It is significant that on the plaintiff's own showing, the net income of plaintiff, *with the verdict added*, during the year of the strike, 1959, is $328,000 more than in 1958, when there was no picketing, and $281,000 more than in 1960, when there was no picketing. (R. 257, 258).

distinction between legal primary and illegal secondary picketing, or to instruct the jury members that they could not take into consideration any losses incurred as a result of the picketing at Overnite's primary premises. (R. 339). The trial court did charge generally that the jury could not find in favor of the plaintiff for any damages which might have resulted solely from picketing the terminals of Overnite Transportation Company, but it made no distinction as to picketing at other terminals or as to what constituted protected, as distinguished from proscribed, picketing. (R. 339-68). Although the damages flowing from those places where picketing was carried on could easily have been segregated, particularly damages claimed at Atlanta, Savannah, Columbia, Charleston, and Richmond, plaintiff made no attempt to do so, but based its claim for damages on all of the strike and picketing activities and resulting expense shown by the evidence, this constituting "one ball of wax," as plaintiff put it. (R. 255).[3]

In his argument to the jury, counsel for plaintiff claimed compensatory damages in the full amount of $363,193, relying on the testimony respecting the extra costs and

[3] That the damages were readily severable is quickly seen from the example of the picketing at Atlanta, Savannah, Columbia, Charleston and Richmond. In those cities the evidence showed only peaceful primary picketing at Overnite's own terminals and there was no evidence whatsoever of any secondary picketing at or near the premises of any neutral employer or any inducement, other than the mere presence of the picket sign, of employees of neutrals to cease handling or delivering Overnite freight. Over two-thirds of the total damages claimed and granted Overnite consisted of the excess labor cost item of $232,837 occasioned by Overnite's being required to hire new employees to handle and deliver freight not handled or delivered by those refusing to cross the primary picket line, and two-thirds of Overnite's total freight was handled at the above five terminals. (R. 241-245, 263, 264). Overnite had records of how many new employees were employed and the amount of their wages at each terminal. (R. 226). Thus simple arithmetic would serve to substantially reduce the verdict in respect to this one item alone; similarly with the item of $51,759 for claims of damages to freight allegedly caused by the inexperienced new employees at each terminal. This again is allocable by terminals, and surely the union is not responsible for any such costs at terminals such as Atlanta where all the union activity was legal any more than it would be liable for any other costs or expenses that an employer might be put to in the course of a lawful strike.

expenses which Overnite had incurred wherever any picketing whatsoever was carried on. (R. 338). The jury entered a verdict in that exact amount. Defendant thereupon moved to set aside this verdict on the ground that it was excessive as a matter of law, (R. 15) but the trial court denied this motion, to which exception was made and error assigned. (R. 609-10).

During the trial plaintiff, in support of its claim for punitive damages, was permitted, over defendant's objections, (R. 58, 65-8, 165-175, 178, 479-500) to introduce evidence of four restraining orders issued by Federal Judge Wilson Warlick in actions brought by Overnite against other motor carriers, in which that Judge found that the refusal of these carriers to accept interchange freight during the Overnite strike was a violation of their duties as common carriers and in which the Judge restrained these carriers from further refusals. These refusals were the same which the plaintiff alleged were caused by the wrongful conduct of the defendant. The trial court, over objection, (R. 115, 175-7, 465-6, 470, 472, 474) then permitted evidence of a contempt conviction of the petitioners and one of its alleged representatives, Rutledge, for violating these restraining orders. In addition, the trial court permitted reference, over objection, to certain proceedings against various local unions affiliated with petitioner, but not petitioner, before the NLRB involving this same picketing, in which that Board had found the picketing of the Overnite trucks by these locals to be in violation of the Taft-Hartley Act. (R. 475-477). Finally, Overnite, over petitioner's objections, (R. 47-51) introduced evidence of petitioner's net worth. (R. 338). All this evidence was introduced and admitted solely on the theory that it tended to show malice as bearing on the issue of punitive damages. (R. 146, 473-5). The jury returned a verdict of punitive damages in the full and exact amount requested by plaintiff, namely $500,000.

Petitioner then filed appropriate motions and exceptions, which specifically raised, among others, the issues in this

case[4] and appealed to the Supreme Court of North Carolina, again raising these issues among others.[5] (R. 28, 31).

On May 2, 1962 that court handed down its decision in which it held that punitive damages could not be claimed or awarded in a suit predicated, as the present one, solely upon allegations of a violation of Section 303, but rejected all other of petitioner's contentions. The Court's opinion did not discuss petitioner's contention that it could not be held responsible for damages flowing from peaceful primary picketing, or its contention that the admission of prejudicial evidence in support of plaintiff's claim for punitive damages required the granting of a new trial.

On June 8, 1962, a Petition for Rehearing was filed with the Supreme Court of North Carolina, again particularly raising the above two contentions, (R. 630), and on July 9, 1962, that Petition was denied. Under the North Carolina procedure, the petition for rehearing was filed with two Justices; one concluded that a rehearing should be granted

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[4] Exceptions taken to failure of the Court to properly charge the jury that they could not take into consideration any losses incurred as a result of primary-picketing. Exceptions 444, 445 and 452 (R. 372, 375). Exception taken to denial of the Motion to Set Aside the Verdict—Exception 468 (R. 421). Exception taken to the failure of the court to set aside the verdict on the ground that compensatory damages found by the jury are excessive as a matter of law—Exception No. 477. (R. 423). Exception taken to the verdict on the ground of insufficient evidence to sustain the verdict as to all issues—Exception No. 468 (R. 421). Exception taken on the ground that there was insufficient evidence to sustain the verdict as to the amount of compensatory damages—Exception 472. (R. 422). Objection made and exception taken to the receipt of evidence as to actions occuring in Atlanta, Georgia, and Savannah, Georgia, and alleged damages resulting therefrom on the ground that there was no evidence that any of said damages resulted from secondary activities—Testimony of Harold R. Simmons, Exceptions No. 242 to 263. (R. 200 to 205). Testimony of William D. Croft, Exceptions 264 to 300. (R. 206 to 215). Testimony of Fred W. Thacker, Exceptions 301 through 309. (R. 217, 218).

[5] Exception taken to failure of the Court to properly charge the jury that they could not take into consideration any losses incurred as a result of primary picketing. Assignments of error X-d thru X-f (R. 578 thru 580). Exception taken to denial of the motion to set aside the verdict. Assignments of error number XVI-e (R. 612). Exception taken to the verdict on the ground of insufficient evidence to sustain the verdict as

and the other that it should not be. Under the procedure of that court, this results in a denial of the motion for rehearing. (R. 646).

REASONS FOR GRANTING THE WRIT

I

This case involves a state court application of Section 303 of the National Labor Relations Act which has resulted in the granting of damages for activities not proscribed by that Section with resulting impairment of federally protected rights. The courts of North Carolina have decided substantial federal questions importantly affecting the national labor policy as expressed in that Section in a manner completely inconsistent with the decisions of this Court. The state courts have construed and applied a federal law, Section 303, contrary to the application and construction of the counterpart to that Section, namely, Section 8 (b) (4) as made by the National Labor Relations Board, the

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to all issues. Assignment of error XVI. (R. 609-611). Exception taken on the ground that there was insufficient evidence to sustain the verdict as to the amount of compensatory damages. Assignment of error XVI-b. (R. 611). Objection made and exception taken to the permission of evidence as to actions occurring in Atlanta, Georgia, and Savannah, Georgia, and alleged damages resulting therefrom on the ground that there was no evidence that any of said damages resulted from secondary activities. Assignment of error X. (R. 211-215; 217-221). Exception taken to the action of the Court in permitting testimony and statements of counsel in the presence of the jury informing the jury that the defendant and its alleged agent, Hugh Rutledge, has been tried and convicted of a criminal charge in Judge Warlick's Federal Court. Assignment of error II, II-a, and II-c. (R. 465, 472). Exception taken to the failure to declare a mistrial because of argument of plaintiff's attorney in a speech to the jury in which he told the jury that the National Labor Relations Board had obtained a restraining order against the Teamsters Union arising out of said strike. Assignment of error II-f (R. 475, 477). Exception taken to the admission into evidence over objection of four Orders of Judge Wilson Warlick, Exhibits 20, 32, 33 and 35, (R. 481-483), and in admitting testimony of various witnesses relating thereto. These orders were injunctions of Judge Warlick arising out of this strike. Assignments of error IV to IV-e. (R. 479-500). Exception taken to the introduction through the witness Hanna of evidence of the contempt proceeding involving Rutledge. Assignment of error No. II. (R. 465-467).

lower federal courts, and this Court, all of which require the separation of legal from illegal picketing for purposes of injunction or damages. Further, the state courts have applied Section 303 in a manner which would operate to penalize unions and their members for exercising rights of peaceful picketing specifically protected under that same federal law and under the Federal Constitution. If this application of Section 303 is to stand, then principles of federal preemption are easily frustrated and federally protected rights of peaceful picketing are readily impaired. Further, the encouragement which the instant case will inevitably give, indeed has already given,[6] to the institution of suits for heavy damages in any labor dispute where otherwise legitimate primary picketing is accompanied by instances of alleged illegal secondary picketing can result in the crippling, if not the destruction, of all labor organizations thus involved. Unless this misapplication of Section 303 is corrected by this Court, that Section, designed by Congress as a means for compensating employers for losses actually incurred as a result of illegal secondary picketing, can become an instrument to impair federally protected rights and to harrass and disable labor organizations. When, as here, the highest court of a state has refused to apply federal law according to its terms, and instead has applied it to punish for the exercise of federal rights, all contrary to decisions of this Court, it is fitting that this Court afford relief.

II

The grave consequences of a misapplication of Section 303 by the state courts are well illustrated by the instant case. A peacefully conducted and otherwise legal primary

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[6] Since the filing of the complaint in the instant case two other cases have been filed by two other carriers in this same state court. *New Dixie v. International Brotherhood of Teamsters*, Superior Court, Mecklenburg County, N. C., S.D. No. 38-183; *Jocie Motor Lines, Inc. v. International Brotherhood of Teamsters*, Superior Court, Mecklenburg County, N. C., S.D. No. 38-184. Both cases were filed in May of 1960 and are now awaiting trial.

strike and picketing against Overnite's principal place of business in Atlanta, as well as at various of Overnite's own terminals in other cities in the middle-southern states, resulted in the refusal by some of Overnite's employees and the employees of neutral employers to cross the picket line to handle Overnite freight, or interline with Overnite. This conduct was entirely legal even though petitioner had no certification and even if it be assumed it represented less than a majority of Overnite's employees. *NLRB v. Teamster Local 639 (Curtis Bros.)*, 362 U.S. 274.[7] The conduct was legal even though the inducements to respect the picket line were made orally and away from the picket line. *Teamsters Local 901 v. NLRB (Gonzales Chemical Co.)* 293 F2d 881 (D. C. Cir. 1961) *and Milwaukee Plywood v. NLRB*, 285 F2d 325 (7th Cir. 1960).

In addition to the above activity, Overnite trucks were followed and picketed when they stopped to load or unload at other and separate terminals or places of business owned or operated by neutral employers. For the purpose of this case, this activity can be considered illegal, the Board as then constituted having so held in respect to this very picketing as carried on by local unions affiliated with petitioner. *Overnite Trucking Co.*, 130 NLRB No. 108.[8]

At the trial, Overnite, over objection, was permitted to introduce evidence of the lawful peaceful primary picketing activities at Overnite's own premises and terminals and to show the damages resulting from such picketing. This damage amounted to over two-thirds of the total actual

[7] The North Carolina Supreme Court's basic misconception of the prohibitions contained in Section 303 is seen by the statement in its opinion that "the cause of action arose by reason of the defendant's unlawful activities and demands for a contract without its prior designation as the bargaining agent for the plaintiff's employees." The cause of action in this case arose prior to the Landrum-Griffin amendments to Taft-Hartley Act and the enactment of 8(b)(7) thereof which, for the first time, arguably made certification a prerequisite to lawful recognition picketing.

[8] The Board as presently constituted considers this type of picketing, standing alone and not including, as in this case, other secondary inducements, to be legal. *United Plant Guard Workers*, 136 NLRB No. 9 (March 5, 1962).

damages claimed by Overnite. Notwithstanding the defendant's vigorous objections, the jury was permitted to consider and include such damages in the verdict it finally rendered in Overnite's favor, such damages being the exact sum claimed by Overnite to have been caused by all picketing at all places, including the primary picketing. Although the damages flowing from the alleged illegal picketing were easily severable from the damages flowing from the legal picketing, neither plaintiff nor the state courts below, although requested to do so by defendant, made any attempt to confine the damages to the picketing which alone constituted a violation of Section 303.

As a final misapplication of that Section, the jury was permitted to hear and consider evidence of an inflammatory and prejudicial nature introduced and admitted soley to support a showing that defendant had acted maliciously and thus could be assessed punitive damages. On appeal, the Supreme Court of North Carolina held that a claim for punitive damages was not allowable in a suit under Section 303, but, nevertheless, declined to correct the mischief done by the introduction of this prejudicial evidence by directing a new trial. Whatever might be the rule as to the admissibility of evidence in proceedings brought under state laws,[9] it would seem that in suits brought under a cause of action created by Congress the parties should be held to a strict rule. See *United Mine Workers v. Patton*, 211 F2d 742 at 751 where the Fourth Circuit Court of Appeals held that the admission of similar evidence of malice was reversible error in a suit under Section 303. In any event it would appear intolerable that Section 303 be converted by a state court into an instrument of oppression either by a rule of evidence or by an application which results in both the granting of excessive and unwarranted damage awards and the impairment of federally protected rights.

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[9] See, however, *Hinson v. Dawson*, 244 N.C. 23, which indicates that under North Carolina law the trial court committed reversible error by admitting such evidence.

III

Both the terms of Section 303 itself and the safeguarding of federally protected rights require the separation of damages in this case. This Court, in *International Rice Milling v. NLRB*, 341 U.S. 665 (1951) held that Section 8(b)(4) of the Act—the counterpart to Section 303—does not proscribe peaceful primary picketing even though an object thereof is to dissuade all persons from entering the premises of the struck employer. In *Curtis, supra*, this Court held that the right of peaceful primary picketing finds affirmative protection under Sections 7 and 13 of the Act, as indeed it does as well under the Federal Constitution. *Thornhill v. Alabama*, 310 U.S. 88 (1940) and *Teamsters Local 795 v. Newell*, 356 U.S. 341 (1958). Thus, Section 303 can be applied *only* to prohibit secondary, not primary, picketing.

More directly to the point, this Court in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, gave assurance that the picketing protections of the Bill of Rights would not "be defeated by insubstantial findings of fact screening reality," and that the Court reserved to itself, "power to search the records in the state courts where a claim of constitutionality is effectively made," (312 U.S. at 293). That case involved a situation where violent picketing was inextricably intermingled with peaceful picketing with a resulting ban on all picketing. Here there was no such intermingling and the picketing activities nd resulting damages were severable. In *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, this Court indicated the necessity for separating legal labor activities from illegal where punishments or prohibitions were being imposed. The Court stated:

> "Though the state court was within its discretionary power in enjoining future acts of violence, intimidation and threats of violence by the strikers and the union, yet it is equally clear that such court entered the preempted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by

petitioners. The picketing proper, as contrasted with the activities around the headquarters, was peaceful. There was little, if any, conduct designed to exclude those who desired to return to work. Nor can we say that a pattern of violence was established which would inevitably reappear in the event picketing were later resumed. What violence there was was scattered in time and much of it was unconnected with the picketing." (355 U.S. at 139).

Various of the federal Circuit Courts of Appeal have specifically held that it is the duty of the National Labor Relations Board and the courts, when confronted with alleged violations of Section 8 (b) (4), or 303, to seek to restrain or allow damages for only those picketing activities which the record shows constitute a violation of these Sections, and to refrain from entering orders which may sweep or include the good with the bad. These same cases hold that effective inducements to respect a primary picket line, whether accomplished by the mere presence of the picket sign or by oral entreaty, do not constitute a violation of Section 8 (b) (4). *Seafarers International Union v. NLRB*, 265 F2d 585 (D. C. Cir. 1959); *Teamsters Local 984 v. Humko Co.*, 287 F2d 231 (6th Cir. 1961), cert. den. 366 U.S. 962; *Milwaukee Plywood v. NLRB*, 285 F2d 325 (7th Cir. 1960); *Chauffeurs Local 175 v. NLRB (McJunkin Corp.)*, 294 F2d 261 (D. C. Cir. 1961); *Local 978 Carpenters v. Markwell*, 50 LRRM 2742 (8th Cir. 1962). In *Humko, supra*, the court stressed the necessity in a case under Section 303 to separate all damages flowing from legal picketing activity from the damages resulting from illegal picketing activity.

In the courts below, respondent relied upon a decision of the 9th Circuit in *Carpenters Local 131 v. Cisco Construction Co.*, 266 F2d 365, cert. den. 361 U.S. 828, to support the totalling of the damages. In that case, the court set forth a "totality of effort" theory under which it permitted recovery under Section 303 for damages resulting from both legal and illegal picketing where the picketing was conducted at a common situs at which the

primary employer, as well as many neutral employers, were at work, and where the lawful and unlawful picketing was so intermingled as to make it difficult, if not impossible, to separate the two.[10] Even in such circumstances of common situs, which are not present here, the Ninth is the only court of appeals to give support to that concept, and other circuits have repudiated it. *Milwaukee Plywood, supra, McJunkin Corp., supra.* The prevailing rule, and the only rule consistent with decisions of this Court, is stated in *McJunkin* as follows: "But peaceful primary picketing and its normal incidents, including requests to neutrals not to cross the picket line, cannot be forbidden though the union has acted illegally elsewhere." (294 F2d at 262).

IV

In *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957) this Court concluded that in collective bargaining contract suits under Section 301 of the National Labor Relations Act substantive federal labor law must be applied, fashioned by the policy of the national labor laws. The rationale of *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), and of the more recent decisions of this Court in *Teamsters Local 174 v. Lucas Flour Co.,* 7 L ed 2d 593 (1962), and *Sinclair Refining Co. v. Atkinson,* 8 L ed 2d 440 (1962) indicate that this same policy is applicable to suits under Section 303 of the National Labor Relations Act. The courts below have applied their own, not federal, concepts to the construction and application of Section 303. Thus the necessity for conforming the

[10] This Court has previously denied petitions for certiorari in two other comparable cases under Section 303. They are *UMW v. Osborne Mining Co.,* 279 F2d 716 (6th Cir. 1960), cert. den. 364 U.S. 881; *Gilchrist v. UMW,* 290 F2d 36 (6th Cir. 1961), cert. den. 368 U.S. 875. *Osborne* and *Gilchrist,* unlike the present case, involved a claim under state common law for tortious, violent conduct entitling the plaintiffs to punitive damages, in addition to a cause of action under Section 303; and there was proof of considerable violence and other common law tortious action, not protected or proscribed by the National Labor Relations Act. In both these cases, unlike the present one, the primary and secondary picketing activities were inseparable and so found by the court.

application of Section 303 to federal labor law demonstrates the need for the intervention of this Court in the instant case. While this Court has undertaken to clarify the law in respect to the construction and application of Section 301 as well as Section 8 (b)(4) of the National Labor Relations Act, it has heretofore had no occasion to pass upon the construction and application of Section 303. That Section has inherent in it problems peculiar to it in the field of damages and which are present in this case, namely the intermingling of damages arising from legal picketing with damages arising from illegal but separate picketing and the introduction of prejudicial evidence having no relevance to any issue cognizable in litigation under Section 303. It is respectfully submitted that for those reasons the instant case affords an appropriate vehicle for review by this Court.

V.

The failure of the North Carolina courts to restrict damages to those resulting from picketing proscribed by Section 8 (b) (4) as interpreted and applied by the Labor Board and the federal courts, further raises an important issue of preemption. This Court, in *Garmon, supra,* made it quite clear that there is no room for state intrusion, whether it be by injunction, damage award or other remedy, in those areas of labor activity which are protected by the National Labor Relations Act. See also *Youngdahl, supra.* Sections 303 and 8 (b)(4) proscribe only certain rather narrowly defined peaceful strike and picketing activity; all other is protected. To permit a state court to use a section of the National Labor Relations Act to grant a damage award for protected labor activity is to fly in the face of all that *Garmon* teaches, and is to afford a ready means of avoiding the principle of federal supremacy. In this case, no less than in *Garner v. Teamsters, Local 776,* 346 U.S. 485 (1953), *Weber v. Anheuser-Busch,* 348 U.S. 468 (1955), and *General Drivers, Warehousemen and*

Helpers, Local Union 89 v. American Tobacco Co., Inc., 348 U.S. 978 (1955), the supremacy clause of Article VI of the Federal Constitution requires that the judgment of the courts below be set aside and the case remanded for further proceedings consistent with the preemption principles announced by this Court in the foregoing cases.

CONCLUSION

It is respectfully submitted that, for the reasons asserted above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix "A"

IN THE SUPREME COURT OF NORTH CAROLINA
SPRING TERM, 1962

Overnite Transportation Company *v.* International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America	No. 245—*From Mecklenburg*

Appeal by the defendant from Pless, J., November 13, 1961, Regular "A" Civil Term, Mecklenburg Superior Court.

In this civil action the plaintiff seeks to recover damages, actual and punitive, alleged to have been caused by the defendant's unfair labor practices in calling and maintaining a strike and secondary boycott designed to compel the plaintiff, and unorganized trucking company, to recognize the defendant as the bargaining agent for the plaintiff's employees.

Summons was issued against the defendant and served on the Secretary of State on September 3, 1959. The plaintiff filed and also served on the Secretary of State the following verified complaint:

"The plaintiff, complaining of the defendant, says and alleges:

"(1) That the plaintiff is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, and maintains one of its principal offices and places of business at Charlotte, North Carolina.

"(2) That the plaintiff is a common carrier, engaged in the business of transporting freight by motor vehicle.

"(3) That the defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is, as the plaintiff is informed and believes, an unincorporated labor organization or Union.

"(4) That the plaintiff derives its revenues and profits from handling and transportation of direct freight, which is a freight transported from origin to destination entirely by the plaintiff, and from handling and transportation of interchange freight, which is freight not transported from origin to destination entirely by the plaintiff but interchanged between the plaintiff and other Trucking Companies and transported part of the way from origins to destination by the plaintiff and part of the way by such other interchange Companies.

"(5) That on or about May 17, 1959, the defendant called a strike against the plaintiff for the purpose of forcing or requiring the plaintiff to recognize or bargain with the defendant as the representative of plaintiff's employees, although the defendant had not been certified as the representative of the plaintiff's employees by any Governmental agency or authority whatever.

"(6) That the defendant was not able to accomplish such purpose by the direct pressure of such strike upon the plaintiff, for despite such strike the great majority of the plaintiff's employees continued at work with the plaintiff and despite such strike the plaintiff remained ready, able and willing to render its common carrier services as it had been doing theretofore.

"(7) That the defendant, however, by an additional means and device, has prevented the plaintiff from carrying on its business in a normal way, thereby damaging the plaintiff as hereinafter set forth; that such means and device which the defendant has thus used against the plaintiff has been as follows: That the defendant has induced and encouraged the employees of the plaintiff's customers and employees of the aforesaid Trucking Companies doing interchange freight business with the plaintiff to engage in a concerted refusal, in the course of their employment, to transport or otherwise handle any goods, articles, materials, or commodities going to or coming from the plaintiff; that the object of such inducement and encouragement of the employees of the plaintiff's customers and said employees of said Trucking Companies was to force and require the said customers and Trucking Com-

panies to cease doing business with the plaintiff and to force and require the plaintiff to recognize or bargain with the defendant as the representative of plaintiff's employees, although the defendant, as stated above, had not been certified as the representative of the plaintiff's employees by any Governmental agency or authority whatever.

"(8) That such action on the part of the defendant was wrongful and in violation of law and was taken by the defendant for the willful, deliberate and malicious purpose of injuring and damaging the plaintiff; that as a result of such action on the part of the defendant, the plaintiff has been shut off from and deprived of freight business which otherwise and normally the plaintiff would have profitably handled and has been required to pay out large sums of money for extraordinary expenses incurred by the plaintiff in its efforts to secure, handle and transport freight shipments and otherwise operate its business despite the wrongful and unlawful acts of the defendant hereinabove set forth; and that in this manner and by this means the plaintiff has been grievously injured and damaged by the defendant.

"(9) That by reason of the matters hereinabove set forth the plaintiff has been injured and damaged by the defendant in the sum of $500,000.00 and is entitled to judgment against the defendant in that amount, and by reason of the defendant's deliberately, willfully and maliciously inflicting such injury and damage upon the plaintiff as hereinabove set forth, the plaintiff is entitled to judgment for punitive damages against the defendant in an additional sum of $500,000.00.

"(10) The acts of the plaintiff in the operation of its business described above affects interstate commerce within the meaning of the Labor Management Relations Act (29 U.S.C. 151, et seq.), and jurisdiction of this cause is conferred upon this Court by Section 303(b) of said Act (29 U.S.C. 187 b).

"WHEREFORE, the plaintiff prays for judgment against the defendant in the sum of $1,000,000.00, together with the cost of this action; and the plaintiff prays the Court for such other and further relief as the Court may deem just and proper."

After the court disposed of preliminary motions, the defendant, on September 29, 1960, filed the following verified answer:

"The defendant, answering the plaintiff's complaint, says:

"1. Paragraph 1 of the plaintiff's complaint is admitted.

"2. Paragraph 2 of the plaintiff's complaint is admitted.

"3. Paragraph 3 of the plaintiff's complaint is admitted.

"4. Answering paragraph 4 of the plaintiff's complaint, the defendant says that it is informed and believes that the plaintiff derives its revenues and profit at least in part from the handling and transportation of direct freight, and in part from the handling and transportation of interchange freight. Except as herein specifically admitted the defendant does not have information sufficient from which to form a belief as to the truth of the plaintiff's allegations and the same are therefore denied.

"5. Paragraph 5 of the plaintiff's complaint is untrue and denied. Upon information and belief, the dispute and such stoppages of work as occurred in the plaintiff's places of business were caused by and resulted from the plaintiff's unfair labor practices and wrongful acts toward and against its employees and their local union.

"6. Answering paragraph 6 of the plaintiff's complaint, it is denied that this defendant sought to accomplish any such purpose as that set forth in the plaintiff's complaint by pressure either direct or indirect, and the allegations of paragraph 6 of the plaintiff's complaint, upon information and belief, are untrue and denied.

"7. Paragraph 7 of the plaintiff's complaint is untrue and denied.

"8. Paragraph 8 of the plaintiff's complaint is untrue and denied.

"9. Paragraph 9 of the plaintiff's complaint is untrue and denied.

"10. Paragraph 10 of the plaintiff's complaint is untrue and denied.

"WHEREFORE, having fully answered the plaintiff's complaint, the defendant prays that the plaintiff have and recover nothing; that this cause be dismissed, and that the plaintiff be required to pay the costs of this action."

The evidence tends to show that Overnite Transportation Company (hereafter called Overnite) is a Virginia corporation duly licensed by the Interstate Commerce Commission and by the licensing authorities of Virginia, North Carolina, South Carolina, and Georgia, to engage in the transportation of freight by motor vehicles in those States. The plaintiff maintained 33 terminals, among which the following are perimeter or gateways: Richmond, Virginia, Asheville, Charlotte, and Winston-Salem, North Carolina, Greenville and Columbia, South Carolina, and Atlanta, Georgia. At the time complained of, Overnite employed approximately 1,500 men. Its average monthly freight carriage was approximately 111,000,000 pounds, 60 per cent of which was freight picked up and delivered within its territory. The remaining 40 per cent was exchange freight, that is, (1) shipments originally received by Overnite to be transferred to other carriers for delivery, and (2) shipments received from other carriers to be delivered by Overnite. The exchanges were made pursuant to agreements. Overnite has exchange agreements with approximately 150 other carriers.

Beginning in April, 1959, the defendant International began efforts to organize Overnite's employees. The activities began in Charlotte and spread throughout Overnite's entire system. The organization attempts met with little success. The union did not, by petition or otherwise, have the National Labor Relations Board call an election to select a bargaining agent for Overnite's workers. The union, however, made demands on the plaintiff to recognize it as the bargaining agent. Overnite refused. Immediately the strike began. Picket lines were established at plaintiff's terminals. Nevertheless the majority of plain-

tiff's employees continued to work and refused to honor the picket lines. Whereupon the union, through its members who were employees of other carriers, organized a boycott against movement of plaintiff's interchange freight. The union's contracts with other carriers contained clauses forbidding discharge for refusal to handle "hot cargo." Any union member who assisted in moving any freight routed over plaintiff's lines was reported to the union for discipline. As a result of the strike the volume of plaintiff's interchange freight fell off materially. In order to prevent complete stoppage of its interchange business, the plaintiff hired additional men, procured additional equipment, and obtained additional operating authority.

According to the testimony of Mr. Simmons, plaintiff's expert accountant, whose evidence will be discussed in the opinion, the plaintiff's excess cost of handling freight was $232,837.00. The cost of guard service to protect interchange freight, including the workers and their equipment during the strike, amounted to $16,662.00. Extra telephone and communication expenses amounted to $2,116.00. Extra cost in moving, including damage thereto, 20 million pounds of freight that normally would have been brought to Overnite's terminals by connecting lines amounted to $51,759.00. The extra cost of operating 23 additional trailers and nine additional tractors during the strike was $20,170.00. The above listed extra costs of operating the plaintiff's business do not take into account the loss of profits in reasonable contemplation during the period of the strike. Mr. Simmons testified that for the first four months of 1959 Overnite experienced a gross increase in its business of 22 per cent over the same period for the preceding year; that after the strike the rate of increase dropped to 16 per cent for the remainder of the year, and that the last eight months of that year should have shown a material increase.

At the trial the plaintiff introduced in evidence the defendant's constitution, Article I, Section 2, which states the purpose of the union to be "To organize under one

banner all workmen engaged in the craft, and to educate them to cooperate in every movement which tends to benefit the organization; . . ." The plaintiff likewise introduced a number of the union's agreements with lines which interchanged with plaintiff, relating to over-the-road transportation, the pickup, forwarding, and freight delivery service. The agreements protected from discharge union employees who refused to handle "hot cargo." The plaintiff introduced photostatic copies of the financial reports showing expenditures by the defendant, by its Joint Council No. 9, and by its several local unions in support of the strike. These reports showed expenditures by International and by Joint Council No. 9 and the local unions involved during the strike activities. The evidence tended to show that approximately $40,000.00 was contributed by International and by its Council No. 9 and by Local 391 which was in trusteeship and operated directly under the order of James R. Hoffa, President of the defendant. The total expenditures in support of the strike by International, by its Council No. 9, and by the local unions involved, exceeded $125,000.00.

The defendant introduced four witnesses, each of whom was a member of the defendant union. Each testified to his participation in the strike as a member of a local union. The testimony tended to confine the strike activities to the local unions and to disassociate International from responsibility. However, Mr. Cook, one of International's witnesses, testified: "The International Union will not pay out any money in support of a strike it does not sanction."

At the close of the evidence the court submitted four issues:

> "1. Was the plaintiff damaged by the wrongful actions of the defendant, as alleged in the complaint?
>
> "2. If so, what amount, if any, is the plaintiff entitled to recover of the defendant as actual damages?
>
> "3. Was plaintiff damaged by the reckless, wanton and malicious actions of the defendant, as alleged in the complaint?

"4. How much, if any, is plaintiff entitled to recover of defendant as punitive damages?

In apt time the defendant requested the court to give the jury special instructions:

"The Court charges you that; under Section 303 of the National Labor Relations Act, if the plaintiff is entitled to any damages at all, it is entitled to recover only those damages it has actually sustained and the cost of this action. Under Section 303, the plaintiff is not entitled to recover punitive damages. Consequently you are instructed to answer the fourth issue, referring to punitive damages with the word, 'None.'"

The Court declined to give the requested instruction, but did charge in part as follows:

"That issue (Third) ladies and gentlemen of the jury, refers to what are known as punitive damages. The Court instructs you, reading from . . . that if you find the conduct of the defendant in respect to this strike was reckless, wanton and malicious, that it was without regard to the rights of the plaintiff, then it would be within your discretion to include in your answer to the last issues a sum of money which you may deem proper as smart money, or punitive damages. You are not required by the law, notwithstanding what your findings as to fact may be, to include any punitive damages, but the whole matter as to whether or not you shall include punitive damages is left to your discretion, to your sound judgment, providing you shall find that the conduct of the defendant was reckless, wanton and malicious.

"Now, ladies and gentlemen of the jury, while every legal wrong entitles the party injured to recover damages, . . . sufficient to compensate for the injury inflicted, not every legal wrong entitles every party to recover exemplary or punitive damages. To warrant the allowance of such damages the act complained of must not only be unlawful, but it must also partake somewhat of a criminal or wanton nature."

The jury answered the first and third issues, Yes, the second issue, $363,193.00, and the fourth issue, $500,000.00. The court entered judgment that the plaintiff recover

$363,193.00 actual, and $500,000.00 punitive damages. The defendant excepted and appealed, assigning errors.

Blakeney, Alexander & Machen,
By: J. W. Alexander, Jr., Ernest W. Machen, Jr., for plaintiff, appellee.

Robinson, Jones & Hewson, Hunter M. Jones, Francis M. Fletcher, Jr., for defendant, appellant.

David Previant, Milwaukee, Wis., Herbert S. Thatcher, Washington, D. C., Edwin Pearce, John S. Patton, Joseph Jacobs, Atlanta, Georgia, of counsel.

Higgins, J.

Before us are 1,500 pages of record, exhibits and briefs. The defendant's assignments of error alone cover 165 pages of the record. They are based on 484 exceptions taken during the course of the long and hotly contested trial. Review in detail is not indicated. Procedural questions involving the service of process and motion to postpone the trial have been considered. They are without merit.

The plaintiff instituted this civil action in the Superior Court of Mecklenburg County to recover damages, both actual and punitive, alleged to have resulted from a strike and secondary boycott called by the defendant in an unlawful effort to compel the plaintiff to sign a union labor contract with plaintiff's employees. The plaintiff alleges its business "affects interstate commerce within the meaning of the Labor Management Relations Act." (29 U.S.C. 151, et seq.) Section 187(a) provides: "It shall be unlawful for the purposes of this section only, in an industry or activity affecting commerce for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to . . . transport . . . any goods, articles, materials, or commodities . . . where an object thereof is— . . . (2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor

organization has been certified as the representative of such employees under the provisions of Section 159 of this title; . . . (b) whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . or in any other court having jurisdiction of the parties and shall recover the damages by him sustained and the cost of the suit." (Note: Section 187(a) seems to have been amended effective September 14, 1959, a date subsequent to the conduct complained of.)

The right to maintain the action and the jurisdiction of the State court to hear it arise by congressional grant. In fixing the rights and liabilities of the parties, the Superior Court on the trial, and this Court on appeal, must accept the interpretation the Supreme Court of the United States has placed upon the Acts of Congress here involved. Constitution of the United States, Article VI, Section 2; Constitution of North Carolina, Article I, Sections 3 and 5; State v. Davis, 253 N. C. 86, 116 SE 2d 365; Constantian v. Anson County, 244 N. C. 221, 93 SE 2d 163; Norris v. Telegraph Co., 174 N. C. 92, 93 SE 465.

Three basic questions are presented by the assignments of error: (1) The liability of International for the damages which proximately resulted from the strike. (2) Sufficiency of the evidence of actual damages to support the jury's finding. (3) Sufficiency of the pleadings and evidence to support an award of punitive damages. Discussion of these questions will necessarily involve the challenged portions of the court's charge with respect to them.

Its constitution states: The International Brotherhood of Teamsters, etc., shall consist of an unlimited number of local unions chartered by International. The stated purpose is "To organize under one banner all workman engaged in the craft, and to educate them to cooperate in every movement which tends to benefit the organization. . . . This organization has jurisdiction over all teamsters, chauffeurs, warehousemen and helpers; all who are em-

ployed on or around . . . automobiles, trucks, trailers, and all other vehicles hauling, carrying or conveying freight, merchandise, or materials." So complete is International's control over local unions that it may suspend the local charter and place the locals in trusteeship under the direct supervision of International's president. Indeed, even in this case, two of the locals, No. 55 and No. 391, involved in this strike, were in trusteeship, operating under the direct authority of James R. Hoffa, International President.

The evidence shows an agent of the union sent out "hot cargo" letters and addressed members of locals, particularly employed by Roadway Express, requesting them not to handle exchange freight for Overnite. The contribution to the expenses of maintaining the strike made by International, the active participation of its Locals Nos. 55 and 391, under trusteeship, and by its Joint Council No. 9, sufficiently show that International was using the locals as its hands and arms to carry on the strike throughout the area according to plans which originated in its own head. N.L.R.B. v. International Brotherhood of Teamsters, 267 Fed. 2d 870, *Certiorari* denied, 361 U.S. 914, Rehearing denied, 361 U.S. 945; Dairy Distributors, Inc. v. International Brotherhood of Teamsters, 8 Utah 2d 124, 329 P. 2d 414, *Certiorari* denied, 360 U.S. 909; United Mine Workers of America v. Patton, 211 Fed. 2d 742, *Certiorari* denied, 348 U.S. 824.

The evidence offered at the trial sufficiently established a principal-agency relationship between International and its local unions in fomenting the strike in order to force plaintiff, an unorganized freight carrier, to enter into an employment contract with the union. There is not a suggestion that the union had been designated or certified as a proper bargaining agent for plaintiff's employees. With respect to the principal-agency relationship, Judge Pless charged the jury:

> "Now, then, coming to the first issue: Was the plaintiff, referring to Overnite Transportation Company, dam-

aged by the wrongful acts of the defendant, as alleged in the Complaint? Now, that issue, ladies and gentlemen, will depend upon several factors. In the first place, the defendant, and you will remember that there is nobody here as party to this case except International Brotherhood which I have referred to as the union in the charge, is the only defendant, and it could be held responsible for what was done by others only in the event this was done in law as agent of the union. . . . To give you what is meant by agency, it is the relation which results where one party called the 'principal' authorizes another party, called an 'agent' to act for him or it. The relationship of principal and agent may be created by word of mouth, writing or implied, by consent or acquiescence. A servant is an agent of his master, to deal more generally with things rather than with persons. The distinguishing difference between an agent and servant is that an agent can contract for his principal and bind his principal contractually, whereas a servant cannot so bind in contract his master. Both principal and master are liable for the torts of their agents and servants when acting in the scope of their employment.

"A person is responsible for not only his own acts, but for the acts of his employees or his agent when they are done within the scope of their employment and in furtherance of the business which is entrusted to them. The test of the liability, in all cases, depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it. The simple test is whether they were acts within the scope of his employment, not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him."

The parol testimony and the exhibits, interpreted in the light of International's constitution, clearly indicate the cords which joined the many locals together in the strike effort, binding them to act in close concert throughout the four states, were manipulated by International. The evidence was sufficient to warrant the jury in finding the plaintiff was damaged by defendant's wrongful acts.

The second question presents a somewhat more difficult problem. For proof of its actual damages, Overnite relied upon the testimony of its vice president and general manager and accounting supervisor, Mr. P. S. Simmons. After completing business college training and a course in financing, he became bookkeeper and cashier of Motor Transit Company, Raleigh. He was appointed terminal manager and then traffic manager dealing with cost analysis.

Upon returning from service he accepted employment by the North Carolina Utilities Commission and traveled throughout the State instructing motor carriers as to the method of keeping records, checking costs, and making the reports required by the Commission. He testified before the Commission in matters involving rates, etc. In 1951 he became assistant traffic manager for Overnite. "In addition to our own company's expense items and accounts in detail, I study and analyze, and compare with our own, rates reported of other carriers, . . . this information being obtained through . . . reports on file in the I. C. C. and various State commissions. . . . This is the kind of thing I deal in all the time. . . . I testified in various finance cases before the I.C.C. and the State commissions, . . . 60 or 70 times."

The evidence was sufficient to support the court's finding the witness was an expert in cost accounting. With respect to the weight to be given his testimony, Judge Pless instructed the jury:

> "Ladies and Gentlemen of the jury, in holding Mr. Simmons to be an expert in the field of cost analyses, the court does not mean by that, that you are bound by his testimony, nor should you give it any more credit than you would any other witness that appeared to be qualified, that is, it permits him to analyze and to some extent synopsize figures that would otherwise take a great deal of time. Of course, in that field, he is also permitted to express opinions that he would not be permitted to express were he not held to be an expert. However, none of these things are binding

upon you, you would treat him just as you would any other witness, to determine whether or not it is acceptable to you. The objection is overruled."

Mr. Simmons testified he kept a daily record of the costs of the strike to his company. He gave the gross revenue each year beginning in 1955 as $5,843,530.00, which had increased to $12,000,000.00 in 1959. In 1958 the profit return was 9.2 per cent. In 1959 it was 3.11 per cent. The witness did not have in court the original records. He examined the records in 33 terminals operated by Overnite during 1959. Synopsis sheets made by him or under his direction, gave composite of the original records. In summary he testified the following losses resulted from the strike: Excess labor costs, $232,837.00; guards, $16,662.00; loss and damage to freight, $51,759.00; Extra telephone and communications expense, $2,116.00; operating additional tractor-trailers, $20,170.00. The witness did not make a calculation showing the loss of profits during the term of the strike. However, counsel in the argument used the percentage of the net income fall-off during the strike which showed the loss to be $59,819.00. The jury accepted the evidence, including the calculation, and fixed plaintiff's actual damages at $363,193.00.

The one debatable item in the recovery is the loss of profits. "If a regular and established business is wrongfully interrupted, the damage thereto can be shown by proving the usual profits for a reasonable time anterior to the wrong complained of. . . . in a case of this kind it is open to the plaintiff to show a loss of profit upon the issue of injury and damage to his business, if he is able to present evidence from which the jury may be able to draw a reasonably accurate conclusion, not based on conjecture or speculation, as to the extent of the injury inflicted and amount of damage caused." Steffan v. Meiselman, 223 N.C. 154, 25 SE 2d 626.

On the issue of actual damages, Judge Pless charged:

"I instruct you further that such actual damages, if any, allegedly sustained by the plaintiff must be proven

with reasonable certainty, although it is not required that such actual damages be proven with mathematical exactness or with absolute certainty unless the damages are such as are susceptible of definite or precise proof. However, in no event may an award of damages be based on conjecture, speculation or guess.

"In your consideration of what actual damages, if any, were sustained by the plaintiff in this case, you are not authorized to presume any such damages or base your decision thereon on guesswork or speculation, but you must look to the evidence as introduced in the trial of this case and determine whether a preponderance of the evidence shows, with reasonable certainty, that plaintiff, in fact, sustained any actual damages, and if so, you must then determine whether the evidence shows, with reasonable certainty, that any definite sum of such damages was sustained by the plaintiff.

"Recovery for the loss of future profits may be had where they are reasonably certain in character and are the proximate result of the tort. The proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn."

The plaintiff's evidence made out a case for the jury on actual damages. It was sufficient to support the amount fixed.

Under the Labor Management Relations Act of Congress, recovery is authorized "for the damages sustained and the cost of the suit." Damages sustained are limited to actual damages suffered as a result of the wrong inflicted. United Mine Workers v. Patton, 211 Fed. 2d 742. Punitive damages are never awarded as compensation. They are awarded above and beyond actual damages, as a punishment for the defendant's intentional wrong. They are given to the plaintiff in a proper case, not because they are due, but because of the opportunity the case affords the court to inflict punishment for conduct intentionally wrongful.

The plaintiff has stated one cause of action and only one. It does not allege a breach of the peace. It does not allege violence. So far as the evidence discloses, the picketing and the refusal to handle exchange cargo were peaceful. The cause of action arose by reason of the defendant's unlawful activities and demands for a contract without its prior designation as the bargaining agent for the plaintiff's employees. In this particular field, the Federal authority is exclusive.

Admittedly, where a cause of action is asserted for a violent tort under State law and is coupled with a cause of action for violation of the Labor Management Relations Act, the State court may proceed to hear and determine both causes. The court may award punitive damages if authorized by State law in the case involving the State tort, but actual damages only may be awarded in the cause of action under the Labor Management Relations Act. The Federal courts recognize the right of the State court in a proper case to award punitive damages for a tort committed in violation of a right the State has recognized under its police power, although it is coupled with a separate Federal right, the jurisdiction over which is given to the State court by Congress. The joinder is permitted because the Act of Congress does not forbid it. San Diego Trade Council v. Garmon, 399 U.S. 236; United Automobile Workers v. Russell, 356 U.S. 634.

In the Garmon case the Supreme Court of the United States used this significant language: "It is true that we have allowed the States to grant compensation for the consequences as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. United Automobile Workers v. Russell, 356 U.S. 634; United Construction Workers v. Laburnum Corp., 347 U.S. 656. . . . State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our Federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." (Citing International

Union v. Wisconsin Board, 336 U.S. 245.) In cases where punitive damages have been allowed, a cause of action under State law was alleged, founded on violence, threats of violence, and intimidation. United Mine Workers v. Osborne Mining Co., Inc., 279 Fed. 2d 716, *Certiorari* denied, 364 U.S. 881; Youngdahl v. Rainfair, Inc., 355 U.S. 131; Automobile Workers v. Wisconsin Employer Relations Board, 351 U.S. 266.

In this case the plaintiff's complaint fails to state any separate cause of action under State law based on violence. In view of the authorities here quoted, and others of like import we conclude the plaintiff's pleadings and evidence are insufficient to support an issue for punitive damages. Consequently the defendant's prayer for instructions should have been given. The exception based on its denial is sustained. The award of punitive damages is without a proper foundation and is stricken from the judgment. The record, however, does not disclose error in the award of actual damages.

As to Actual Damages—No Error.

As to Punitive Damages—Reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 292

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner

v.

OVERNITE TRANSPORTATION COMPANY,

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the State of North Carolina

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 292

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner

v.

OVERNITE TRANSPORTATION COMPANY,

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the State of North Carolina

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

Where a Labor Union is admittedly guilty of widespread illegal secondary boycotting activity conducted in the course of its strike for recognition against a trucking company engaged in interstate commerce, is a State Court, in an action brought under Section 303 of the Labor Management Relations Act, 29 USC § 187, powerless to award the full measure of damages found to have been the proximate result of such illegal activity, upon the Union's claim that

the primary picketing which was carried on simultaneously with the secondary boycotting contributed in some measure to the injury inflicted?

Where there is no showing that the State Court misconstrued or misapplied substantiative federal labor law in awarding a judgment for compensatory damages under Section 303 of the Labor-Management Relations Act, should this Court be called upon to review the evidentiary rulings and procedural details of the trial merely to determine whether the State Court took adequate steps to exclude all irrelevant matter from the jury's consideration?

STATEMENT OF THE CASE

The plaintiff, Overnite Transportation Company, now Respondent before this Court, is a common carrier of freight by motor vehicle operating in the States of Virginia, North Carolina, South Carolina and Georgia. It engages in pick-up and delivery service and over-the-road hauling of general commodities, the great bulk of its shipments being less than truckload lots.

Approximately 40% of the freight transported by the plaintiff is interchange — that is, freight which is picked up and hauled from points within the plaintiff's territory to gateway terminals where it is transferred to other common carriers for delivery to consignees outside this territory, and freight which originates outside the plaintiff's territory and is received by plaintiff from other carriers for delivery to points within its territory (R. 38-39). This interchange freight averaged approximately 46 million pounds per month during the periods in controversy (R. 63-64).

The plaintiff maintains gateway terminals on the south of its territory at Savannah and Atlanta, Georgia, on the west at Greenville, South Carolina, and at Charlotte, Asheville and Winston-Salem, North Carolina, and on the north at Richmond, Virginia (R. 39). In addition, it operates some twenty other terminals in the four-state area and employs over-all approximately 1,500 persons (R. 38, 226).

In the Spring of 1959, the defendant International Brotherhood of Teamsters, now Petitioner before this Court, launched an intensive organizational campaign among plaintiff's employees (R. 284, 311). The Union's effort was aimed primarily at gaining the allegiance of persons employed at the Company's gateway terminals and the larger inter-system terminals at Columbia and Charleston, South Carolina, and Hickory and Greensboro, North Carolina. However, the campaign extended over the Company's entire system (R. 151-152).

In April and May, 1959, two strategy meetings were called by the defendant's Joint Council 9 for the purpose of coordinating the organizational efforts of the various locals (R. 151-152, 303-304). The meetings were attended by top union officials from locals in eleven cities, including Atlanta, Charlotte and Richmond. Also present were the president and two organizers of the Joint Council, and an assistant to a vice-president of the International (R. 152, 306-307).

A similar meeting was held in Atlanta about the middle of May, 1959. By this time it had become clear that the campaign to organize Overnite's employees was not making the desired headway, and accordingly it was decided at this meeting that picketing should commence simul-

taneously at all major terminals of the Company on Sunday, May 17 (R. 307).

The Union's purpose was admittedly that of forcing the Company to recognize the locals as bargaining agents for the employees in their respective territories, although no National Labor Relations Board election had been held, nor was any sought by the Union at any of the Company's terminals (R. 227).

The picket lines went up as scheduled, but relatively few of the Overnite employees honored them. In fact, out of the more than 1,000 persons employed at the eleven terminals where picketing occurred, only 64 — or about 6% — left their work in support of the strike (R. 55-56). However, there was an immediate disruption in the orderly flow of freight passing between the plaintiff and other carriers, and within a short time normal interchange activities were brought virtually to a standstill (R. 61-63, 64-65, 82, 110, 113-114, 125, 132-135, 163, 172-173, 174-175, 182-183, 206-213, 223).

The employees of most neutral secondary carriers with which the plaintiff customarily did business simultaneously and concertedly refused in the course of their work to handle or otherwise deal with the plaintiff's freight. The great majority of these secondary employees were themselves members of the defendant Teamsters Union, and the evidence indicated that their refusal took place as a result of direct appeals by Union agents (Ibid; 100, 108).

At several gateway terminals the Union caused pickets regularly to follow Overnite's pick-up and delivery trucks to the terminals of interchange carriers and to the loading

docks of shippers for whom the plaintiff hauled large quantities of freight (id.). At most of these secondary locations the employees consistently refused to handle Overnite shipments and often refused to do any work while Overnite equipment or personnel were at their employer's premises (R. 103, 113, 125).

When occasionally a Union driver for a secondary employer would have the temerity to disregard the roving picket line, his name and truck number would be quickly recorded and sent to the local office of the Union. This would result in the member's being tried by the Joint Council for violating the Union's hot cargo policy, and disciplinary penalties such as fines were imposed (R. 103-105, 127).

One of the roving pickets testified that their object was to induce the secondary employees "to sit down and stop working" (R. 102). In many instances, they would not rely merely upon the picket sign for this inducement, but would go directly to the docks, gain the attention of the employees working there, and call for a cessation of work (R. 100, 108, 121-123, 125).

Nor did the Union rely solely upon this ambulatory picketing in its efforts to make the boycott effective thoughout the Company's system. Union officials went to the docks of secondary employers, at times when no equipment of the plaintiff was being picketed there, and directed the employees not to load or unload anything from Overnite trucks (R. 57-58, 87-89). In some cases the secondary carrier's terminal manager would be warned in the presence of his employees that a strike would be called against his company if it did not cease handling Overnite's freight (R. 81-82, 163, 179-180, 189).

The plaintiff was forced to institute a number of extraordinary measures to overcome the paralyzing effect of the boycott. Among other things it hired between 125 and 130 extra employees, it made frequent changes in working hours, shift patterns and work assignments in the freight handling group, and assigned operational duties to administrative employees such as salesmen. Because of the vast increase in back hauling and circuitous routing brought on by the refusal of secondary employees to handle its freight, the Company was required to obtain additional road equipment and to assign to its city pick-up and delivery operations some of the heavy over-the-road equipment not normally used for that purpose. It was also necessary to employ guards for the protection of its property and employees, and to engage in a vast amount of pick-up and delivery service on interchange freight which in the absence of a boycott is carried one way by the other carrier (R. 60-64, 223).

The rate of increase in operational profits declined sharply during this period, despite the fact that the trucking industry as a whole was enjoying a very favorable year. Basic figures on costs, profits, volume of business, gross revenues and other relevant items were presented at the trial for all pertinent periods down to the end of 1959, and analyses of these figures demonstrated that the Company was severely damaged by the Union's illegal secondary boycott.

On appeal from the judgment of the trial court the defendant challenged the validity of both the award for actual damages in the amount of $363,193.00 and the award of $500,000.00 in punitive damages. The North Carolina Supreme Court struck all punitive damages from

the judgment upon the ground that only compensatory damages are embraced within the terms of Section 303(b), and the doctrine of federal preemption denies jurisdiction in the state court to entertain a common law tort claim upon the facts alleged, there being no element of violence or threats to public order. However, the Court found upon a careful analysis of the testimony that "the plaintiff's evidence made out a case for the jury on actual damages [and that such evidence], was sufficient to support the amount fixed." (Appendix to Petition, p. 32).

ARGUMENT

I. The State Court Was Not Confronted In This Case With A Conflict Between Local And Federal Law Bearing Upon The Issue Of Compensatory Damages, Nor Did The Court Seek To Apply Any But Federal Substantive Law In Determining What Conduct Is Proscribed By Section 303 Of The Labor Management Relations Act — And Accordingly, No Federally Protected Rights Were Abridged By Entry Of The Judgment Below.

The defendant does not deny before this Court that it engaged in extensive secondary boycotting activities in violation of Section 303 of the Labor Management Relations Act. Nor is there any dispute about the right of the plaintiff under that Section to recover, in a state court action, all of the damages which it sustained by reason of these illegal activities.

Essentially, the reasons advanced by the defendant in support of its petition come to no more than a claim that the compensatory damages awarded below are excessive as a matter of law. Of course, this in itself would not present any basis for issuance of a writ of certiorari by this

Court for review of a state court judgment. 28 USC § 1257(3). Rules of the U. S. Supreme Court, Rule 19.

But Petitioner contends that the excessiveness of the amount awarded is attributable to a failure of the Supreme Court of North Carolina to acknowledge the supremacy of federal law in actions of this kind, and that such failure, under the circumstances of this case, has resulted in an unwarranted interference with the Union's federally protected right of peaceful, primary picketing.

This is indeed a remarkable contention in view of what the North Carolina Court actually said and did, and in light of what the record establishes as the true nature of the defendant's conduct.

At the very outset of its opinion, after quoting pertinent portions of Section 303, the Court stated:

> "The right to maintain the action and the jurisdiction of the State court to hear it arise by congressional grant. In fixing the rights and liabilities of the parties, the Superior Court on the trial, and this Court on appeal, must accept the interpretation the Supreme Court of the United States has placed upon the Acts of Congress here involved." *Ozernite Transportation Company v. International Brotherhood of Teamsters*, 257 N. C. 18 at p. 26.

Obviously then the situation here is unlike the one presented to this Court in *Local 174, Teamsters Union v. Lucas Flour Company*, 369 U. S. 95, where the Supreme Court of Washington had considered itself free to apply local rules of contract law in a suit covered by Section 301. The North Carolina Court, in approaching its consideration

of the instant case, assumed that in actions brought in the state court under Section 303, substantive rules of federal labor law must be applied to the exclusion of any conflicting local law which may obtain in the jurisdiction on the same subject. Not only did the North Carolina Court readily acknowledge this limitation upon its power in selecting applicable substantive law, it relied upon the limitation in striking $500,000.00 in punitive damages from the judgment.

Ignoring all of this, however, the defendant boldly asserts in its petition that "the courts below have applied their own, not federal, concepts to the construction and application of Section 303.".

In an effort to support this assertion the Petitioner points to the fact that the trial court allowed the jury to hear evidence dealing with several phases of the defendant's strike activity, some of which were clearly primary in character and therefore protected. From this it is argued that the damages awarded serve to penalize the defendant for exercising rights guaranteed by federal law, because, as defendant contends, the court failed to explain properly to the jury what activities were lawful and what were unlawful under the secondary boycott provisions of the Act as construed by the National Labor Relations Board and the federal courts.

Unquestionably, the jury did hear testimony relating to strike activity which, standing alone, would not in itself be sufficient to establish the existence of a proscribed secondary boycott. However, this evidence was clearly relevant and admissible in view of other testimony in the case, and the jury was carefully instructed as to the use of this

evidence in accordance with the prevailing rules of federal labor law."

The trial judge began with the following charge: "In the first place, Ladies and Gentlemen, it is entirely legal and lawful for people to belong to a Union. It is entirely legal and lawful for a Union to solicit membership by those who do not belong to it and in doing so they are permitted to undertake various methods . . ., one of which is picketing, and it is not a violation of the law for a labor organization to picket the premises of an employer in an attempt to organize the employees of that company. Neither is it a violation of the law for [the Union] to picket another corporation in an attempt to induce members of the first employer's organization to join" (R. 341-342).

In addition, the court charged the jury in accordance with a written instruction requested by the defendant as follows: "Picketing of the primary employer, that is, the Company with whom the Union has the primary dispute, is not forbidden by Section 303 of the National Labor Relations Act. Therefore, you may not find in favor of the plaintiff as to any damages which may have resulted solely from picketing at the terminals of Overnite Transportation Company" (R. 342).

The defendant complains that the trial court, in giving its instructions on this aspect of the case, "made no distinction as to picketing at other terminals or as to what constituted protected, as distinguished from proscribed, picketing" (Pet. 6). Apparently the defendant has overlooked the following instructions which were given by the court in accordance with the defendant's own written requests:

"There is evidence in this cause of the following of trucks of the plaintiff by certain of the pickets and picketing at the premises of secondary employers while freight was being picked up or delivered by employees of Overnite Transportation Company. In this connection, the Court charges you that Section 303 of the National Labor Relations Act does not contain a provision which condemns picketing of employees of the plaintiff merely because it occurs at a place where it comes to the attention of and incidentally affects employees of another, even where picketing could be carried on at a terminal of the plaintiff where no other employer maintains its place of business. The picketing at the site of another employer while deliveries are being made or freight is being picked up by employees of plaintiff and such incidental effect as results therefrom are factors to be considered in determining whether or not said section of the National Labor Relations Act has been violated, but alone are not conclusive. The presence of these factors does not warrant a failure to consider other facts which are relevant and perhaps countervailing" (R. 342-343).

"The bargaining contracts introduced in evidence in this case contain provisions to the effect that an employee in the bargaining unit covered by said contracts may individually elect whether or not to handle freight interchanged with a carrier against whom a strike is being conducted. At all times relevant to this proceeding the execution of a contract containing such a clause was not illegal. Therefore any individual action of an employee, not induced by the defendant, not to handle the freight of plaintiff would not be a violation of law by the defendant" (R. 347).

There is nothing, we respectfully submit, either in what the state courts said or in what they did, lending any support to defendant's contention that local rather than federal law concepts were followed in arriving at the judgment below. Indeed, there is not even any indication that the law of North Carolina actually differs from the federal law either as to the legality of primary picketing or as to the factors to be considered in distinguishing primary picketing from illegal secondary boycotting. The law which the trial court gave to the jury on this aspect of the case was not always characterized as to source. But if it was state law, it certainly was compatible — and not in conflict — with the law as fashioned by the Labor Board and the federal courts under the national labor policy. *Local 174, Teamsters Union v. Lucas Flour Company*, 369 U. S. 95.

II. Neither Principles Of Federal Labor Law Nor The Facts Established By The Record In This Case Support Petitioner's Contentions Regarding The Severance Of Damages Caused By Protected Strike Activity From Those Caused By Unlawful Boycotting In Suits Brought Under Section 303 Of The Labor Management Relations Act.

Essential to the Petitioner's entire argument before this Court is the broad assumption that much of the strike activity against the plaintiff was protected primary picketing, and that "over two-thirds of the total actual damages claimed by Overnite" resulted "from such picketing" (Pet. 11-12).

The assumption is clearly erroneous, however, upon several grounds. First, it embraces the untenable legal conclusion that no proscribed secondary boycotting activity

was shown to have occurred in five of the eleven cities where Overnite terminals were picketed. The defendant insists that, because there was no direct evidence of ambulatory picketing in Atlanta, Savannah, Columbia, Charleston or Richmond, its strike activity at those locations must automatically be considered as protected without regard to whatever else the evidence may show.

Obviously this is not true because, as the defendant Union would be the first to agree, the presence of ambulatory picketing does not in and of itself, automatically and in all cases, establish a violation of Section 303; and, by the same token, the absence of ambulatory picketing will not in and of itself preclude a finding that a violation of that section has occurred. The lawfulness of the defendant's conduct must be judged upon all of the relevant facts appearing in the record.

And the record in this case abounds with uncontradicted testimony showing (in Atlanta, for example, R. 199-222) consistent, widespread and repeated refusals by members of the Teamsters Union to handle Overnite freight or to work while Overnite equipment was present at the premises of their employers. The evidence further shows that in so doing, these secondary employees were not exercising their separate and individual judgment in the matter, but were acting in concert at the behest and for the benefit of the defendant for the purpose of bringing pressure upon their own employers to stop doing business with Overnite.

That evidence of the sort contained in this record is sufficient to warrant a finding that the Union has violated Section 303 or its counterpart Section 8(b)(4), is supported by a number of federal court decisions. *National*

Labor Relations Board v. Local 364, International Brotherhood of Teamsters, 274 F 2d 19 (C. A. 7); *National Labor Relations Board v. Local 135, International Brotherhood of Teamsters*, 267 F 2d 870 (C. A. 7), *cert. den.* 361 U. S. 914, *reh. den.* 361 U. S. 945; *National Labor Relations Board v. Local 830, International Brotherhood of Teamsters*, 281 F 2d 319 (C. A. 3). And there is nothing in the cases cited by the Petitioner (Pet. 11) indicating a contrary view.

Petitioner's assumption that large portions of the plaintiff's damages were caused by primary picketing is likewise refuted by other facts in the record. For example, the Petitioner proceeds upon the theory that Overnite suffered heavily from the refusal of its own employees and the employees of neutral employers to cross the picket lines at Overnite's gates — whereas in truth these picket lines resulted in a very minimum of inconvenience. Only 64 of Overnite's 1,500 employees ever failed to cross the lines, and all of these were soon replaced. The overwhelming bulk of the difficulty experienced by the Company in trying to continue a profitable business arose from its inability to get freight handled properly at the docks and premises of other employers and from its inability to retain customers whose employees were refusing to work on Overnite's freight. Furthermore, as we have seen, the inducements to engage in such refusals took place not at the site of the primary picket line, but at the customer's or connecting carrier's place of business.[1]

[1] The statement found in footnote 9, page 6 of the Petition, to the effect that plaintiff's excess labor costs were occasioned by the necessity for hiring additional employees to do the work of persons refusing to cross the *primary* picket line, is patently incorrect. The evidence, to which reference is made in the Statement of Case, *supra*, shows that most of this cost was a direct result of secondary employee refusals to work at their own docks.

This is not to say, of course, that none of the damages sustained by plaintiff were the result of otherwise lawful primary picketing. Obviously, a portion of the damages were occasioned by what might be termed primary aspects of the strike — which brings us to the ultimate question of whether the state courts failed to apply federally accepted principles of labor law when they permitted the jury to determine the amount of damages attributable to the Union's illegal conduct under the instructions appearing in the record.

First we should note that the Petitioner is factually in error when it states that "the damages flowing from the alleged illegal picketing were easily severable from the damages flowing from the legal picketing" (Pet. 12). The very nature of the plaintiff's business, particularly the interchange portion precludes the possibility of establishing reliable profit and loss figures on a terminal by terminal basis.

And the nature of the strike activity made it virtually impossible to determine with mathematical accuracy what portion of the Company's losses were allocable to specific items of Union conduct.

The only proper course in such situation was for the plaintiff to present the facts, as it did, dealing with pertinent aspects of its business before, during and after the strike. It then became a matter for the jury to determine what portion of the injury resulted from the defendant's illegal acts — as a matter of proximate cause — under proper instructions of the Court. Excerpts from these instructions were quoted by the North Carolina Supreme

Court in its opinion (Pet. Appendix, p. 31-32). The full text appears in the record (R. 339-368).

Petitioner cites a number of decisions in which the federal courts have discussed, in another context, the importance of differentiating between protected primary activity and proscribed secondary activity (Pet. 13-15). In most of these cases the courts were able to draw the line with considerable exactitude because they were dealing with language to be employed in an injunction or a Labor Board order.

Nothing approaching the same precision can be employed in a Section 303 action when the nebulous factor of causation is an inescapable ingredient. In such situation, the approach used by the Court of Appeals for the Ninth Circuit in *Carpenters Union Local* 131 *v. Cisco Construction Co.*, 266 F 2d 365 (C. A. 9), *cert. den.* 361 U. S. 828, and by this Court in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, is appropriate, and that is precisely what the North Carolina Court was justified in doing in the instant case.

Actually, the Court did not go as far as the *Cisco* case, which treated all of the strike activity as infected with illegality by reason of the fact that proscribed boycotting activity was inextricably intermingled throughout. Rather, the North Carolina Court took an approach more favorable to defendant and instructed the jury to award only such damages as it found proximately resulted from the illegal portion. Under these circumstances the Petitioner is not justified in charging that the action of the courts below deprived it of any federally protected rights.

CONCLUSION

It is submitted that the Petitioner has failed to show any respect in which the North Carolina Courts have misconstrued or misapplied any decisions of this Court or any principle of federal labor law governing actions under Section 303; that the judgment below is just, proper, and free from any of the errors claimed in the Petition; that no sound reason has been advanced warranting a review by this Court; and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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PETITIONER'S PETITION FOR REHEARING

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PETITIONER'S PETITION FOR REHEARING

I

Denial of the petition herein leaves standing a precedent-making application of Section 303 of the National Labor Relations Act which can well debilitate the labor movement. Not even the strongest of unions can long survive the exaction of over $300,000.00 for the peaceful exercise of rights guaranteed by both the federal statutes and the federal Constitution, and that is precisely what the courts of North Carolina have sanctioned in this case.

Petitioner's original petition stressed the necessity for a proper federal interpretation of Section 303. Respond-

ent's brief in opposition (an answer to which had been prepared and was available for filing on the day the Court denied the petition herein) and further consideration of the issues indicates that prime emphasis should have been placed on the subversion of federally protected rights flowing from the decisions below. Further, it should be emphasized that this case presents a legal and not a factual question, the facts being undisputed in the record. Finally, and most important, this case involves a conflict between the several circuit courts of appeal—a substantial ground for review by this Court not stressed in the original petition.

The basic issue in this case can be sharpened as follows:

> **Whether a federally protected right is impaired and Section 303 of the National Labor Relations Act is misapplied by the refusal of the state courts of North Carolina, in an action for damages brought to them under that Section, to require the separation and elimination of damages attributable to federally protected labor activities from those attributable to labor activities not so protected.**

The right so protected is the right peacefully to engage in primary picketing of an employer against whom a lawful strike has been called. No matter how this case is viewed, petitioner and its members have been penalized for the exercise of that right, for in one degree or another, damages attributable solely to peaceful primary picketing carried on pursuant to a legitimate and peacefully conducted primary strike have admittedly been assessed against petitioner.[1] As long as that penalty stands the possibility exists that similar penalties can be imposed in

[1] Respondent's Brief, page 15, states: "Obviously a portion of the damages were occasioned by what might be termed primary aspects of the strike." That damages resulting from legal as well as illegal activity were assessed is conclusively shown by the action of the jury which, notwithstanding the trial court's instructions, returned a verdict for the exact amount of all of the damages which respondent had proved to be a result of the entire strike including the peaceful picketing of respondent's own premises.

the future so that free exercise of the right to strike and peacefully picket, is necessarily restrained. No restraint, previous or present, was contemplated by Congress when it established employee rights under Sections 7 and 13 of the Act, and this Court has heretofore tolerated no such restraint, constitutional rights also being involved. *NLRB* v. *Teamsters Local 639 (Curtis Bros.)*, 362 U. S. 274 (1960); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

Section 303 is subject to unusually great uncertainties, since that Section depends upon the interpretation and application of the most frequently litigated union unfair labor practice provision of the Act—Section 8(b)(4) (commonly known as the secondary boycott section). Indeed, mere changes in the composition of the Board have resulted in changes in the meaning afforded to Section 8(b)(4), and consequently to Section 303. This is well illustrated in the present case where the roving, or follow-the-truck, picketing, the sole conduct alleged by the respondent to be illegal, has from time to time, as it is now, been held to be entirely proper, the legality being dependent upon the composition of the Board or the court before whom the issue is brought. Cf. *Sales Drivers* v. *NLRB (Campbell Coal Co.)* 292 F2d 514 (D.C. Cir 1955), cert. den. 351 U.S. 972 (1956); *NLRB* v. *Teamsters Local 968 (Otis Massey Co.)*, 225 F2d 205 (5th Cir. 1955), cert. den. 350 U.S. 914 (1955). A labor organization which has knowledge beforehand that it may be held responsible for the heavy damages which might well result from lawful strike and picketing activities if any illegal activities are also found to have taken place, would hesitate and in most instances refrain from engaging in a strike at all. And this is to say nothing of the strong encouragement to extensive litigation which will follow if the precedent established below is permitted to stand.

Petitioner's contention is simply that in any Section 303 case, the failure either of the plaintiff or of the court or of the jury to sever damages flowing from protected labor activity from damages flowing from unprotected labor activity operates not only as a perversion of the statute under which suit has been brought, but also as a basic

impairment of a federal right. Such a contention is far different from an assertion that damages are excessive, that the instructions to the jury were inadequate or that there were errors in procedure. (See respondent's brief, pages 7, 8.)[2]

That the amount of damages in a particular case which may be attributable to the protected activity may, unlike the situation here, be small or even negligible in comparison to the damages attributable to the illegal activity is beside the point and does not detract from the basic principle of the right to engage in a protected activity free from prior restraint or subsequent penalty. Likewise with any alleged difficulty in segregating the one from the other; if as here such segregation is at all possible, certainly the obligation to do so is on the plaintiff who has invoked the statute and who is entitled to recover only those damages which can be proven to constitute a violation of Section 303. Under that Section, as in all civil litigation, the burden of proof is on the plaintiff.

In the present case, contrary to what respondent states in its Brief in Opposition, it so happens that the damages attributable to the exercise of legal labor activity are severable, and also are in a very considerable amount. This can be quickly demonstrated:

1. Respondent, while asserting (Brief in Opposition page 14) that only 64 of Overnite's 1,500 terminal employees respected the primary picket lines at these terminals and that this resulted in only "a very minimum of inconvenience" and little damage, does not deny, nor could it, that the action of other employees of other carriers to

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[2] So far as procedure is concerned petitioner, as indicated in its petition herein, raised the issue of the intermingling of damages first by objection to introduction of evidence of damages resulting from legal picketing, second by objection to the inadequacy of the trial court's instructions on this issue, and third by appropriate motions to set aside the jury's verdict. Notwithstanding the foregoing, the courts below refused petitioner any relief.

respect those same picket lines resulted in considerable inconvenience and damage. The exact degree of this was testified to by Mr. P. S. Simmons, general manager and cost analyst for the company and the sole witness testifying to the damage suffered by respondent. Asked the cost to the company "of picking up freight from interchange carriers and bringing it to your terminal[s] during the period of this strike" he replied that "not including Ashville, it was costing us $45,000.00 a month" due to the necessity "to provide equipment and additional personnel." (R. 240). Forty five Thousand Dollars a month for 4½ months, the duration of the strike, amounts to $202,500.00, a not inconsiderable sum.[3]

2. The other element of damage claimed by respondent was that occasioned by the refusal of employees of other employers working at other neutral or non-Overnite terminals or warehouses to load or unload or check Overnite trucks and freight at such terminals. It is admitted that there was no so-called roving or follow the truck picketing at any of these neutral premises in at least 5 of the major cities in which Overnite operated (Atlanta, Savannah, Columbia, Charleston and Richmond) and there was no evidence of any neutral employee reaction at any of these

[3] On R. 243 the same witness said "our company having [had] to pick up this 20-million-odd-pounds of freight that was normally brought to our terminal by connecting lines and employees." At R. 213, Mr. Walter D. Cross, general manager of the respondent's Atlanta terminal, testified that during the entire period of the strike not a single load of interchange freight was delivered to the Atlanta terminal and on R. 223 and 224, Mr. A. M. Price, Vice-President of Operations for respondent, testified that because of the strike the company had to "deliver the freight that was destined to other carriers, and we had to pick up the freight the other carriers normally brought to us" and that this required hiring 125 additional employees and leasing 17 additional trailers at $167.00 apiece per month, and that these 125 employees were scattered around about 10 or 11 different terminals, "I think the largest number at any one terminal was Atlanta which was about 30." (R. 225 & 226.)

cities except Atlanta, and even at Atlanta, the evidence disclosed only individual refusals of neutral employees to handle Overnite freight which, for all the record shows, were solely the result of individual choice in the matter after receiving knowledge of the strike. Evidence such as this standing alone does not constitute a violation of Section 303; the cases cited by respondent on page 14 of its brief all involved and required other acts of inducement by the union. Indeed the refusal of neutral employees to handle the struck freight was in the exercise of their legal right given them under the bargaining contracts covering their work which permitted them to refuse to handle freight interchanged with a carrier against whom a strike was being conducted. See respondent's brief, page 11. Such clauses were entirely legal at the time of the strike, at least where, as here, there was no showing that each of the numerous secondary employers who were parties to the agreements containing these clauses had each repudiated such clauses or had done other than acquiesce in their use. *Local 1976, Carpenters, v. NLRB (Sand Door and Plywood Co.)*, 357 U.S. 93 (1958). Thus no damages sustained in any of those five cities were shown to be the result of any violation of Section 303.

The basic error in respondent's whole approach to this case is in considering the strike and the damage caused by the strike together with any and all activities carried on in connection with the strike as "one ball of wax" or "one package."* Of the many thousands of secondary boycott

* R. 225, 226. Q. Now Mr. Simmons, in the preparation of the figures that you brought to present in this hearing, you did not therefore look to see whether or not there was some locations where there was picketing only in front of Overnite as distinguished from picketing elsewhere so that the so-called damage, if any, might be differentiated as to where picketing was called primary and was called secondary, did you?

A. Well, as I saw this thing as I viewed it, it was all one ball of wax.

Q. So the only thing that you did was just took it for granted that you had a ball of wax, but so far as any complete investigation

cases processed by the National Labor Relations Board each year, most, if not all, involve a primary strike as well. Under the "one package" approach which the North Carolina courts have permitted respondent to make in this case, all of these could serve as the basis for a heavy damage award; at the very least, the refusal to require that proof of damages be limited solely to that flowing from the illegal conduct, with the inevitable result, as here, of a heavy damage showing, will greatly encourage Section 303 litigation.[5] Guidelines which safeguard federally protected labor activities of labor organizations apparently are not forthcoming from the state courts which have refused even to discuss the issue; only this Court can provide the necessary protection. That under the record in this case a union can be assessed damages in the amount of $363,000.00, a great portion of which is obviously attributable only to the effects of lawful primary picketing is not only shocking and unconscionable but operates to pervert the purpose of Section 303 and to severely impair the exercise by unions and their members of rights protected under the federal statute and under the federal Constitution. Surely the refusal of the North Carolina courts to afford relief in this situation warrants the intervention of this Court. The implications of this case have heavy impact throughout the entire labor movement.

II

The decision of the Ninth Circuit in *Carpenters Local 131 v. Cisco Construction Co.*, 266 F2d 365 (9th Cir. 1959), cert. den. 361 U.S. 828, relied on by the courts below, is in direct conflict with the decision of the Sixth Circuit in *Teamsters*

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to segregate any damages here, as to primary or secondary picketing, you had no information on that at all, is that right?

A. No, I have not separated them.

See also R. 262.

[5] Since the filing of the Petition herein, the litigation referred to in footnote 6 thereof has resulted in a damage award against petitioner in the amount of $224,000.00.

Local 984 v. Humko Co., 287 F2d 231 (6th Cir. 1961), cert. den. 366 U.S. 962, the decision of the Seventh Circuit in *Milwaukee Plywood v. NLRB*, 285 F2d 325 (7th Cir. 1960), and the decision of the District of Columbia Circuit in *Chauffeurs Local 175 v. NLRB (McJunkin Corp.)*, 294 F2d 261 (D. C. Cir. 1961). *Cisco* supports the "one ball of wax" theory; the other circuits repudiate that doctrine and the sweeping of the good with the bad, and stress the necessity for the separation of the legal from the illegal in the application of the Taft-Hartley Act. This direct conflict in doctrine can be resolved only by this Court.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court reconsider its previous denial of the Petition for Writ of Certiorari requested in this case and grant such request.

Respectfully submitted,

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CERTIFICATE OF COUNSEL PURSUANT TO RULE 58

Herbert S. Thatcher, one of the counsel for petitioner in the above matter, hereby certifies that this Petition for

Rehearing is presented in good faith and not for delay and is restricted to matters not previously brought to this Court's attention. The undersigned counsel has been authorized by counsel for respondent to state that the filing of this Petition for Rehearing will not be objected to on the ground of delay.

HERBERT S. THATCHER